

TO: The Supreme Court of Iowa
FROM: The Iowa Freedom of Information Council
DATE: April 23, 2007
RE: Proposed Rules for Electronic Filing

The members of the Iowa Freedom of Information Council thank the Court for the opportunity to comment upon the proposed Rules for Electronic Filing of Iowa court records. The Council is a non-profit coalition of Iowa journalists, librarians, attorneys, educators and others who are concerned about open government.

Council members applaud the Iowa judiciary's proposal to make more information from the court system available electronically. Electronic filing promises to make the judicial process more accessible to the public and more transparent. It will help Iowa's journalists better fulfill their job of informing the public. Reporters who cover the courts are especially hopeful that the new system will be easy to use and that journalists will be able to receive e-mail alerts about cases or courthouses that they are covering.

However, several areas of the proposed rules raise concerns. The specific sections are discussed below, along with comments submitted by Iowa FOI Council members that illustrate our concerns:

Division V, Public Access

Rule 16.503 Bulk distribution. (Page 39, lines 1-3)

The proposed rule says, "The judicial branch will not make bulk disclosure or sell database information that is confidential or otherwise protected by court order." The wording of Rule 16.503 is unclear. If the intent of the proposed rule is to ban all bulk disclosures of court information (not just that which is confidential or protected by court order), the Council would be opposed to such a ban.

One of the great strengths of the Internet as a medium of communication is the ability to provide users with links to further information that will deepen their understanding of a topic. As news organizations and others enhance their online publications, database information, especially government information that provides background and context for news stories, will become an increasingly valuable part of the Web experience for readers. Any rule that would limit access to that information would be harmful to the public interest.

Division VI, Protection of Personal Privacy

Rule 16.602 Protected Information. (Page 39, lines 17-23, and Page 40, lines 1-2)

The Rules would require the redaction of certain information from court documents before they are filed electronically. Two categories of information listed under Rule 16.602 raise concerns: dates of birth (Page 39, line 21) and "other unique identifiers" (Page 40, line 2).

Iowa journalists are concerned that eliminating dates of birth from public court records would create an unnecessary and dangerous risk of identity confusion. Date of birth is often the only piece of information that differentiates two people with the same name, especially when Social Security numbers are eliminated from records.

In addition, the prohibition against court records containing “other unique identifiers” is too vague and may have a chilling effect on the release of public information, prompting attorneys to redact more information than is necessary to address legitimate privacy concerns.

Zack Kucharski, police and court reporter, Cedar Rapids Gazette in Johnson County: I don’t believe that dates of birth should be restricted from public access on a regular basis. I believe removing birth dates from public access would limit the ability we now have of using that date to establish a positive ID. For example, there are many times each day that I want to know whether a person has a prior criminal record. Matching the birth date is the starting point of making sure I have the same person. The elimination of birth dates would eliminate a very basic way of knowing whether we have the correct person.

While this would impact reporters, I believe it would also negatively impact the public at large because it would increase the chance that misinformation is spread. Depending on the case, that could have very serious impacts. This is especially true in cases where people have common or identical names (including father and son).

I am also concerned about what is included in “other unique identifiers.” If that category includes race, gender, height and weight, I would oppose losing access to that type of information. There are cases where this information is important.

Carol Riha, Associated Press Iowa bureau chief: In addition to “confidential” information, which is defined by law, the court adds “protected” information to its list of exclusions. That includes date of birth — a critical piece of information when determining the identity of a person. It has been available on criminal cases filed online for the past few years, and has been very useful. In some counties, it’s been the only way to distinguish fathers and sons with the same name and similar criminal backgrounds.

Rule 16.604 Information that may be redacted. (Page 41, lines 1-15)

The information that is listed in this category, which allows discretion in redaction, also raises concerns. Some of the wording is vague enough to potentially provide a “black

hole” to hide information that may be sensitive but also important for the public to know. “Proprietary or trade secret information” (line 10) could be used to shield a host of relevant material about businesses involved in court proceedings. Perhaps clarity could be attained by using the definition of trade secrets stated in Iowa Code subsection 550.2(4). “Information concerning crime victims” (line 13) and “sensitive security information” (line 14) are also broad and vague categories. Eliminating home addresses (line 15) from records creates the same hazards of misidentification as redacting dates of birth.

Brad Hicks, president and CEO, Mid-America Publishing Corp.,

Hampton, Iowa: I can't imagine printing names of suspects and convicts without an age or address to identify the individual, and when it comes to researching court cases on the Internet, not having a date of birth available would virtually eliminate our ability to find people because so many have the same name.

Jeff Eckhoff, The Des Moines Register courts reporter: The new limitations may turn out to be a problem, because there's a big loophole in there for lawyers to withhold whatever they want as long as they classify it as “sensitive security information” or “information concerning crime victims.”

Zack Kucharski, Cedar Rapids Gazette: I also have a concern about Rule 16.604. I do not believe that home address should be included on that list. Much with age, eliminating addresses also increases the chance of misinformation.

Carol Riha, AP: This entry is also a worry. We would want to know the home address or hometown, again for identification purposes. The other information could be important to a story — for example, information concerning crime victims? What does that mean? Were these characterizations arbitrarily chosen by the court system? It says such information may be kept secret unless required by law. It should take the approach that the information is public, unless confidentiality is required by law.

Rule 16.609 Sanctions. (Page 43, lines 14-20)

The proposed Rule provides sanctions for filing documents containing protected information, but what about sanctions for purposefully redacting information that should have been filed? Deliberately withholding from public records information that is in the public interest is at least as grievous an offense as failing to redact sensitive information. The wording of this section fails to reiterate the Court's longstanding support of an accessible and transparent judiciary.

Concern about misuse of public records misplaced

In addition, the Iowa FOI Council argues that the fears of identity theft from public records that seem to underlie the privacy provisions of the proposed Rules are misplaced.

The General Commentary on Electronic Filing Rules states that the Court's concern about privacy is rooted in the fact that "[i]n the past many parties routinely provided the court with a party's personal information whether or not the information was required by the court" (Page 9, lines 19-21). In the Internet age, "[p]eople throughout the world will be able to view this information almost as soon as it is filed and with very little effort" (Page 10, lines 1-2). The new privacy protection rules "are meant to assist in protecting certain identifying information from widespread dissemination and possible misuse" (Page 10, lines 2-5).

While fraud and identity theft from the misuse of individuals' personally identifiable information is a real and growing issue, easy access to personal information in public records does not seem to be a significant source of the problem. A 71-page report by the General Accounting Office in 2002 ("Identity Theft: Prevalence and Cost Appear to be Growing," GAO-02-363) contains no mention at all of public records. (In 87 percent of the identity theft cases studied, the personal information was obtained by a friend or acquaintance of the victim, or from a stolen wallet. In the remaining cases, information was obtained through mail theft, burglary or Internet scams.) The President's Identity Theft Task Force recommendations in September 2006 also contain no mention of public records (www.ftc.org/2006/09/0609interimrecommend.pdf) and the U.S. Department of Justice fails to mention public records in its discussion of "common ways to commit identity theft" (www.usdoj.gov/criminal/fraud/idtheft.html).

The members of the Iowa Freedom of Information Council recognize and respect the need for protecting legitimate privacy interests contained in judicial records. And if attorneys are including unnecessary personal information in court records, perhaps in order to embarrass opposing parties, the Court has a legitimate interest in preventing that abuse of the system.

But the sections of the proposed Rules listed above go too far in eliminating personally identifiable information from public court records. They would, in fact, negatively affect the public interest by increasing the risk of widespread misidentification of individuals and by creating a chilling effect on the release of public information. These sections of the Rules are not in the spirit or tradition of openness long established by the Iowa Supreme Court.

Thank you for your attention to our concerns. Please do not hesitate to contact us for more information.

Sincerely,

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